



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

September 13, 1996

Ms. Jennifer Soldano
Deputy General Counsel for Operations
Texas Department of Transportation
125 East 11th Street
Austin, Texas 78701-2483

OR96-1654

Dear Ms. Soldano:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 33107.

The Department of Transportation (the "department") received a request for 29 categories of documents concerning the construction of a bridge across the Houston Ship Channel. You claim that section 552.110 of the Government Code exempts all of the requested information from disclosure. You have submitted documents to us for review. We note that the documents you submitted do not appear to be representative of the documents requested.¹

Additionally, Williams Brothers Construction Company, Inc. ("Williams Brothers"), the prime contractor on the construction project, has submitted a response under section 552.305 of the Government Code, claiming that sections 552.101, 552.103, 552.104, and 552.110 except certain categories of requested documents from disclosure. Williams Brothers indicates that it has no objection to disclosing information responsive to the following numbered requests: 1-8, 13-20, 23, and 25-26.² Williams Brothers also

¹This office repeatedly asked the department to submit responsive documents, but the department submitted only Williams Brothers Construction Company, Inc.'s prequalification package and a list of the department's Houston District Contracts for fiscal years 1984 through 1995.

²Williams Brothers claims that no documents responsive to categories 6-8, 13-15, 17-20, and 23 exist and that the department has no duty to create responsive documents. We note that the department claims that only one category of responsive documents does not exist: documents created by the department in reviewing Williams Brothers' request for equitable adjustment. The Open Records Act does

submitted to this office samples of documents it believes are responsive to the request. Again, however, it appears that these documents are not representative of the type of information Williams Brothers claims is excepted from disclosure.³

Section 552.303 of the Government Code provides that “[a] governmental body that requests an attorney general decision shall supply to the attorney general the specific information requested.”⁴ See Open Records Decision Nos. 499 (1988), 497 (1988) (where requested documents are numerous and repetitive, governmental body should submit representative sample; but if each record contains substantially different information, all must be submitted). Responsive documents or representative samples of responsive documents are required because “[i]n order to determine whether information is subject to a particular exception, this office ordinarily must review the information.” Open Records Decision No. 497 (1988) at 4. Without reviewing responsive documents, or representative samples of those documents, we cannot determine whether any claimed exception applies. We find that the department has not met its burden under chapter 552 as to documents that were not submitted to this office. Consequently, absent a demonstration that the information is confidential by law or that other compelling reasons exist as to why the information should not be made public, you must release the requested information that was not submitted to this office for review. Open Records Decision No. 195 (1978).

Section 552.103(a), the “litigation exception,” excepts from disclosure information relating to litigation to which the state is or may be a party. We note that the department has not claimed that section 552.103(a) excepts the requested information from disclosure. The purpose of section 552.103(a) is “to protect the *interests of the state* in adversary proceedings or in negotiations leading to the settlement thereof.” Open Records Decision No. 588 (1991) at 2 (quoting Open Records Decision No. 301 (1982) at 1) (emphasis added). Williams Brothers claims that information it has provided to the department falls within this exception, but as it appears the department’s interests are not at issue, and the department has not raised this exception, section 552.103(a) does not

(Footnote continued)

not require a governmental body to disclose information that did not exist at the time the request was received. Open Records Decision No. 452 (1986) at 3.

³This office sent letters pursuant to section 552.305 of the Government Code to the other two companies whose documents were requested, informing them of the request and of their obligation to claim any exceptions to disclosure they believe apply to the requested documents and their arguments as to why those claimed exceptions apply. One of the companies, Greiner Engineering, did not respond. The other company, Figg Engineering Group, responded and stated that it did not claim any exception to disclosure. Therefore, the department may not withhold these documents from disclosure.

⁴After this request for information was received, the legislature amended chapter 552 of the Government Code. Act of May 29, 1995, 74th Leg., R.S., ch. 1035, 1995 Tex. Sess. Law Serv. 5127 (Vernon). This requirement is now found at section 552.301(b)(3).

except these documents from disclosure. Open Records Decision No. 542 (1990) at 4 (governmental body may waive section 552.103(a) exception).⁵

Williams Brothers also claims that section 552.101 excepts the information from disclosure because it is confidential under section 154.073 of the Civil Practice and Remedies Code. Section 552.101 excepts from disclosure "information deemed confidential by law, either constitutional, statutory, or by judicial decision." This section encompasses information protected by other statutes. Section 154.073(a) provides confidentiality for communications made as part of alternative dispute resolution procedures. However, Williams Brothers has not demonstrated how section 154.073 is applicable in this instance. The alternative dispute resolution procedures provided under chapter 154 include mediation, mini-trial, moderated settlement conference, summary jury trial, and arbitration. The department procedures under the administrative code do not appear to constitute any of these listed procedures and are dissimilar in nature to the provisions in chapter 154 because they do not make use of any impartial third party, such as a mediator. Therefore, the confidentiality provision of section 154.073 is not applicable.⁶

Williams Brothers next claims that section 552.101 of the Government Code excepts the requested information from disclosure because constitutional privacy protects the disclosure of its financial information. Williams Brothers argues that it has only one shareholder and that releasing corporate financial information would be the same as releasing the individual shareholder's financial information. We disagree. Corporations have traditionally been recognized as having identities separate from their shareholders. *Commonwealth of Massachusetts v. Davis*, 168 S.W.2d 216 (Tex. 1942), *cert. denied*, 320 U.S. 210 (1943). This office has previously determined that although background financial information regarding individuals is excepted from disclosure under common law privacy, companies and corporations do not have a similar right of privacy. Open Records Decision No. 620 (1993). Therefore, although Williams Brothers has only one shareholder, the company cannot claim the privacy protection of section 552.101 to except disclosure of the company's financial information.

Williams Brothers also claims that section 552.104 excepts the requested information from disclosure. Section 552.104 excepts from disclosure information that,

⁵Williams Brothers also claims that the information is excepted from disclosure because Williams Brothers submitted documents to the department "with the expectation that the information submitted would be maintained by the Department as confidential." Information is not confidential under the Open Records Act simply because the party submitting the information anticipates or requests that it be kept confidential. *Industrial Found. v. Texas Indust. Accident Bd.*, 540 S.W.2d 668, 677 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). Unless the information falls within one of the act's exceptions to disclosure, it must be released, notwithstanding any agreement between the department and Williams Brothers.

⁶Additionally, we note that in subsequent correspondence to this office, the requestor has stated that he is not requesting "communications that occurred between [the department] and Williams Brothers during their meditation" but "documents produced prior to any mediation proceeding."

if released, would give advantage to a competitor or bidder. The purpose of this exception is to protect the interests of a governmental body in competitive bidding situations. See Open Records Decision No. 592 (1991). Section 552.104 is not designed to protect the interests of private parties that submit information to a governmental body. *Id.* at 8-9. This exception protects information from public disclosure if the governmental body demonstrates potential specific harm to its interests in a particular competitive situation. See Open Records Decision Nos. 593 (1991) at 2, 463 (1987), 453 (1986) at 3. Furthermore, section 552.104 is inapplicable when the bidding on a contract has been completed and the contract is in effect. *E.g.*, Open Records Decision No. 541 (1990) at 5, 514 (1988) at 2, 319 (1982) at 3. Since the department has not asserted section 552.104 and, moreover, the contract has already been awarded, section 552.104 does not except the requested information from required public disclosure.

Finally, both the department and Williams Brothers claim that section 552.110 of the Government Code excepts the requested information from disclosure. Section 552.110 excepts from disclosure trade secrets or commercial or financial information obtained from a person and privileged or confidential by statute or judicial decision. The two categories of information excepted by section 552.110, "trade secrets" and "commercial or financial information," must be considered separately. Open Records Decision No. 550 (1990) at 3.

The Texas Supreme Court has adopted the definition of "trade secret" from the Restatement of Torts, section 757, which holds a "trade secret" to be:

any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers. It differs from other secret information in a business . . . in that it is not simply information as to single or ephemeral event in the conduct of the business. . . . A trade secret is a process or device for continuous use in the operation of the business. . . . [It may] relate to the sale of goods or to other operations in the business, such as a code for determining discounts, rebates or other concessions in a price list or catalogue, or a list of specialized customers, or a method of bookkeeping or other office management.

RESTATEMENT OF TORTS § 757 cmt. b (1939). If a governmental body takes no position with regard to the application of the "trade secrets" branch of section 552.110 to the requested information, we must accept the private owner's claim for exception as valid under that branch if that person establishes a *prima facie* case for exception and no one submits an argument that rebuts the claim as a matter of law. Open Records Decision No. 552 (1990) at 5.

Williams Brothers claims that two types of information are trade secrets: (1) its "methodology", and (2) its financial information. We will address each of these categories of information in turn. Williams Brothers states that its "methodology" includes "how the job is figured, the solutions found to particular problems, information about the location of support facilities, the support companies owned by Williams Brothers, and similar information used to put Williams Brothers' methodology into effect." However, the documents submitted to this office for review do not appear on their face to contain any "methodology" as defined by Williams Brothers, nor has Williams Brothers adequately explained how this methodology is revealed in these documents.⁷

Williams Brothers submitted to this office for review transmittal letters, a summary of pending disputes with the department, expert witnesses' identities and opinions, cost information, a production chart, and a table of contents of the information submitted to the department in connection with the department's contract claims procedure. None of these documents appear to contain trade secrets or to be part of the "methodology" Williams Brothers discusses in its argument. As to the submitted information, Williams Brothers has not made a prima facie case that this information is a trade secret. The costs incurred by a contractor on a particular government project and production results are not "formula[e]," "pattern[s]," or "device[s]." See RESTATEMENT OF TORTS, *supra*; Open Records Decision Nos. 319 (1982) at 3, 306 (1982) at 3. To the extent that this information is a "compilation of information," it is not a trade secret because Williams Brothers does not use it on an on-going basis; instead, this information relates solely to Williams Brothers' contract with the department. Furthermore, we do not believe that the requested pricing information constitutes information as to "a process or device for continuous use in the conduct of the business." See *id.* Therefore, we conclude that the documents submitted to this office for review may not be withheld from disclosure under the trade secret prong of section 552.110.

The department and Williams Brothers also claim that the second prong of section 552.110 excepts the requested information from disclosure. In Open Records Decision No. 639 (1996), this office established that it would follow the federal courts' interpretation of exemption 4 to the federal Freedom of Information Act in applying the second prong of section 552.110. In *National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974), the court concluded that for information to be excepted under exemption 4 to the Freedom of Information Act, disclosure of the requested information must be likely either to (1) impair the Government's ability to obtain necessary information in the future, or (2) cause substantial harm to the competitive position of the person from whom the information was obtained. *Id.* at 770. "To prove

⁷The department also submitted a list of department contracts in the Houston district for fiscal years 1984 through 1995. As the department made no separate argument as to why the submitted information is excepted from disclosure, we assume that the department intended to claim that section 552.110 also excepts this document from disclosure. The department did not assert that the information is a trade secret, nor has the department established how this information falls within the second prong of section 552.110. Therefore, the department may not withhold this information under section 552.110.

substantial competitive harm, the party seeking to prevent disclosure must show by specific factual or evidentiary material, not conclusory or generalized allegations, that it actually faces competition and that substantial competitive injury would likely result from disclosure.” *Sharyland Water Supply Corp. v. Block*, 755 F.2d 397, 399 (5th Cir.), *cert. denied*, 471 U.S. 1137 (1985) (footnotes omitted).

Although Williams Brothers claims that the department’s ability to obtain similar information in the future will be impaired if Williams Brothers is required to divulge the submitted information, we believe that argument fails. *See, e.g., Bangor Hydro-Elec. Co. v. United States Dep’t of the Interior*, No. 94-0173-B, slip op. at 9 (D. Me. Apr. 18, 1995) (no impairment because “it is in the [submitter’s] best interest to continue to supply as much information as possible” in order to secure better usage charges for its lands); *Racal-Milgo Gov’t Sys. v. SBA*, 559 F. Supp. 4, 6 (D.D.C. 1981) (no impairment because “[i]t is unlikely that companies will stop competing for Government contracts if the prices contracted for are disclosed”).

Therefore, we must consider whether Williams Brothers has established the second prong of the *National Parks* test. Although we believe that Williams Brothers has established that it maintains the confidentiality of the submitted information and that it faces competition, we do not believe that Williams Brothers has shown that release of the submitted information will cause substantial competitive harm. In support of its claim under the *National Parks* test, Williams Brothers contends:

[S]uch information is used in connection with more than one competitive bidding process. As a result, the release of the information would impair all competitive bidding. The fact that the information is used in connection with more than one competitive bidding process and the fact that the Department of Transportation will be opening bidding on future contracts is sufficient to show that release of the information would cause harm to the competitive position of Williams Brothers. . . .

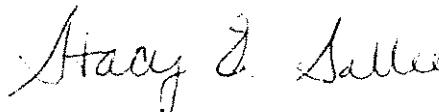
Finally, the substantial nature of the harm that would result from release of the information is clear from the face of the information itself, from Williams Brothers’ affidavit, and from the evidence previously submitted regarding the competitor who sought such information from Williams Brothers and a number of other construction companies in Texas in discovery in Cause No. 94-043987--*J.D. Abrams, Inc. v. Balfour Beatty Construction, Inc.*; in the 250th Judicial District Court of Travis County, Texas.

We believe that these statements, taken together with Williams Brothers’ prior submissions to this office, do not establish the competitive harm prong of the *National Parks* test but are merely conclusory. Further, after reviewing the submitted information, we do not see that the information shows on its face how release of that information

would harm Williams Brothers. Therefore, the department may not withhold the requested information under the second prong of section 552.110.

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied upon as a previous determination regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,



Stacy E. Sallee
Assistant Attorney General
Open Records Division

SES/ch

Ref.: ID# 33107

Enclosures: Documents submitted by Texas Department of Transportation

cc: Mr. Steven R. Reed
Houston Chronicle Publishing Co.
Dallas Bureau
400 South Record, Suite 850
Dallas, Texas 75202
(w/o enclosures)

Mr. Joel R. White
Ogden, Gibson, White & Brooks, L.L.P.
1750 Pennzoil South Tower
711 Louisiana
Houston, Texas 77002
(w/o enclosures)

Ms. Jennifer S. Riggs
602 Harthan Street
Suite A
Austin, Texas 78703
(w/enclosures - documents submitted by Williams Brothers)